***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 77-1001

IN THE

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 77-1001**

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

—v.—

MATTHEW MADONNA,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLANT MATTHEW MADONNA

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### Preliminary Statement

This is an appeal from a judgment of conviction imposed by Hon. Robert L. Carter following a jury trial. The defendant was convicted of conspiring to violate 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 952(a) and of a substantive offense under 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A). The defendant was sentenced to a maximum term of fifteen-years imprisonment on each count, the terms to run consecutively, and was fined $25,000 on each count. The Indictment appears at pages 8-11 of the Appellant's Appendix.

## Statement of the Case

On August 27, 1976, appellant Matthew Madonna was indicted on two counts. The first count charged him, together with four others (Salvatore Larca, Joseph Boriello, Joseph Florio and Richard Klinger), with a conspiracy to import and distribute heroin. The second count charged Madonna, together with Larca and Boriello, with a substantive narcotics violation. A. 8-11.[1] Boriello and Florio pleaded guilty. T. 105, 490-91. Madonna, Larca and Klinger went to trial and were convicted as charged.

The heroin importation which was the subject of this case had been engineered by Boriello. Through Florio and Klinger respectively he recruited two couriers, Gene Travers and Jan Portman, who met him in Bangkok and, under his supervision, undertook to smuggle into the United States large quantities of heroin packed in the false bottoms of suitcases. Both of the couriers were caught with the goods by customs agents at the Honolulu airport, Travers on August 17 (T. 677) and Portman on August 18. T. 445. Both confessed and implicated Boriello as their principal.[2] T. 677-680, 445, 451-85 *passim*. They also implicated Florio and Klinger, the intermediaries through whom Boriello had recruited them. T. 679-80, 446-51.

Travers was then brought to New York in custody of narcotics agents who secreted themselves in his apart-

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[1] References designated "A. ...." are to the appendix; those hereinafter designated "T. ...." are to the transcript of the district court minutes.

[2] Travers and Portman were separately charged and pleaded guilty under an agreement by the prosecutor to bring their cooperation to the attention of the judge at sentencing. T. 446, 680.

ment. On August 20 Boriello arrived in New York and made contact with Travers to arrange delivery of the heroin. The narcotics agents, with Travers' consent, recorded first Boriello's phone conversation with Travers and then their face-to-face conversation in the apartment when Boriello arrived to take delivery. When the suitcases had been stowed in the trunk of the car Boriello had arrived in, the agents arrested him. T. 703-04.

Boriello informed the agents that he was supposed to deliver the car with the heroin to Larca at 58th Street and Fifth Avenue. T. 224-26. The agents allowed Boriello to drive to the rendezvous, first making arrangements to monitor the delivery. They observed Boriello arriving in the red Ford and Larca and Madonna emerging from a restaurant to speak to him. Then they saw Boriello walking to Larca's Cadillac and Madonna and Larca walking to the Ford. Madonna entered the Ford at the driver's seat and Larca on the passenger side. At that point they were both arrested. T. 224-28, 880-87.

Despite the full witness-stand confessions of Boriello, Florio, Travers and Portman, none of them in any way implicated Madonna. Boriello was the only one of them who claimed even to have heard of Madonna. He said he had met him for "one minute" at Larca's home on August 20,[3] but nothing was said at that time relating in any way to the events of that day. T. 344. He said, moreover, that he had had no expectation of finding Madonna at the rendezvous. T. 346-47. The government had pressed him, said Boriello, for anything that could implicate Madonna, but he could not give them what

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[3] There was testimony, contradicting Boriello, to the effect that Boriello had left Larca's home that day some time before Madonna's appearance at the gate and so could not have met him. *Infra*, p. 11.

they wanted because there was nothing to give.[4] T. 298-99. In view of the total absence of any testimonial evidence connecting Madonna to the crime, the district court kept him in the case because of circumstantial evidence alone. A. 81. The Court summed up that evidence as follows:

> "The circumstantial evidence, as I see it, is one, renting of the car in a name not his own, the red Grenada, that Grenada being utilized by Mr. Boriello for the supposed transport of the heroin; your taking possession of the car at 58th Street and Fifth Avenue and your rental of the car at a time when the evidence shows that you had also rented another car and therefore had the use of the car for your purposes, and your presence at Mr. Larca's home at the time when Mr. Boriello made his visit on his return from the trip.[5]
>
> "Under those circumstances, it is my finding that a prima facie case has been established." A. 151-52.

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[4] The government, in its attempt to squeeze out of Boriello's testimony something that might tend even indirectly to implicate Madonna, represented him as having testified that Larca, in setting up the rendezvous, had said he would be coming there with another man. Much as the government may have desired such testimony, it did not quite come out that way. Boriello's testimony was:

> "He said *either* 'I will be there,' or 'We will be there,' or 'my friend will be there,' indicating more than one person." T. 220 (emphasis added).

[5] In addition, one Visceglie, an imprisoned informer, testified to an aborted negotiation with Madonna four and one-half years earlier for a narcotic purchase. That evidence was received, however, not as probative of the misconduct charged against Madonna, but only as evidence of intent if the misconduct could be found to have been established by other evidence. A. 78-79.

By way of defense, evidence was offered to show that:

1. Madonna's false "Paul De Robertis" identity, in which he had rented the red Ford, was one that he had established long before any of the events in this case in connection with a liaison he was conducting in Florida with a young lady named Joy.

2. He had rented the car as Paul De Robertis on August 19 in anticipation of Joy's arrival for a visit in New York.

3. When he discovered on the afternoon of August 20 that his friend Larca had lent the car to Boriello he expressed anger at the lending of his car to someone he did not know.

4. His purpose in driving with Larca to 58th Street and Fifth Avenue was to retrieve the car from Boriello.

Madonna's position in this appeal is that the evidence against him as so gossamer thin and conjectural that, even if this Court should conclude that it was sufficient to support the verdict, it was certainly not so overwhelming as to render harmless those judicial errors, hereinafter detailed, which could have caused the jury to reject his defense. In view of our appellate position, therefore, we need here detail only so much of the evidence and the proceedings as will demonstrate the prejudicial effects of the district court's erroneous rulings.

## A. The Renting of the Car in the De Robertis Name.

Madonna's use of his De Robertis identity in renting the car was so heavily emphasized, not only by the district court (A. 81, 151-52), but also by the government, both in its opening statement (T. 47, 58) and in summa-

tion (T. 1801, 1806-07), that it must necessarily have loomed very large in the jury's consideration. The conflicting contentions were, by the government, that he used the false identity to mask his narcotics activities (T. 1807) and, by Madonna, that he used it in connection with a secret menage he kept in Florida with Joy.

The government's contention, although the jury may have adopted it, had glaring weaknesses:

1. If Madonna's purpose in creating a separate identity, fully equipped with Florida addresses, credit cards and a bank account, was to use it in his alleged narcotics business in order to prevent his accomplices from learning his true identity, then why, having just been introduced to Boriello as Madonna (as Boriello said [T. 219]), would he proceed to "blow his cover" by allowing Boriello to use the red Ford, with the rental contract in the name of De Robertis in its glove compartment, and then arrive in person at the rendezvous to take delivery from Boriello?

2. If, as the government maintains, Larca was as much Madonna's lackey as Boriello was Larca's and if Madonna, indeed, was the true power behind the operation, who sought to make himself impregnable by staying in the background and causing all observable acts to be performed by others (T. 46, 1782), why would he allow a car he had personally rented, albeit in a false name, to be used to carry contraband? Surely, his lackey Larca could have procured transportation less dangerous for Madonna. And why would Madonna expose himself by personally taking delivery at the rendezvous?

3. Madonna rented the red Ford on *August 19*. The prosecutor, with the wealth of evidence

he had on *all the other defendants*, was perfectly aware that he had *no evidence* to show that Madonna, when he rented the car, had any idea when Boriello would arrive with the heroin. In his opening statement, therefore, the prosecutor employed the shabby device of relating Madonna's rental of the car on August 19 to the arrival in New York that same day of the courier Travers. "The same afternoon Travers got into New York," said the prosecutor, Madonna rented the car "in a phony name because it was going to carry the anticipated Bangkok delivery." T. 58. There is not a shred of evidence, however, that either Madonna or Travers had ever heard of the other's existence, let alone that there could have been any way for Madonna to know that Travers had arrived in New York carrying heroin. By the government's own theory it is Boriello with whom Larca and, indirectly, Madonna dealt. Boriello's arrival, therefore, is what would have triggered activity, not Travers'. As for that, the record is clear that none of the alleged co-conspirators—not Larca, not even Boriello's half brother, Ralph Battista—had any idea that Boriello had returned from Bangkok until he showed up at Larca's door the afternoon of *August 20*. Indeed, when Ralph Battista testified that he recognized the sound of Boriello's car driving by Larca's house on August 20, the prosecutor derided the testimony, pointing out in summation that "Battista didn't expect his brother back, didn't know when he would be back. . . ." T. 1759. If Boriello's own brother, whom he implicated as a co-conspirator in the crime (T. 244-46), did not expect him back as of the afternoon of August 20, how could Madonna possibly be found to have rented a car on August 19 for use in the delivery of the heroin that Boriello was to bring back from Bangkok?

On the other hand, the defense contention that Madonna had rented the car in anticipation of Joy's arrival, although the jury apparently rejected it, had a great deal of substance. The government, to be sure, considered Madonna's paramour to be "the fading smile of the Cheshire cat" (T. 1753), presumably because she was not produced at the trial. T. 1807. Her existence was fleshed out, however, through the testimony of the witness Starace who had met her several times in Madonna's company (T. 1505) and who had driven Madonna to the auto-rental office on August 19 "to rent a car, because his girl was coming in from out of town someplace" (T. 1499) and then accompanied him to a midtown restaurant owned by Madonna's sister where he was to receive a telephone call from Joy. T. 1501-02.

The menage Madonna maintained with Joy in Altamonte Springs, Florida, was testified to by the manager and the maintenance man of the apartment house where, under the name De Robertis, the couple had lived together in Apartment 33-A since October 1, 1975. T. 1483-95. Sometimes Madonna paid the rent and sometimes the woman. T. 1485-86, 1490. From time to time, they were seen leaving the apartment together in the morning. T. 1491-92. Further verification of the Florida menage was provided by two private investigators retained by the defense who visited the apartment, interviewed neighbors and brought back and exhibited in the courtroon. the assortment of male and female clothing they found there. T. 1534-40, 1586. The government, although fully aware of the existence of the apartment from papers found on Madonna when he was arrested (T. 863-65), made no attempt to ascertain its substantiality.[6] It con-

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[6] All the government did was to check a registry which listed the apartment as a residence of "De Robertis". T. 1207-08. It made no attempt, however, to gain entry to the apartment through the manager or the maintenance man, the only two persons possessing keys to it. T. 1487, 1493, 1495.

tented itself by sneering at what the private investigators brought back from the apartment because there were no hair curlers or the like. "The stuff was placed there," said the prosecutor to the jury. T. 1753. It would seem obvious that if the licensed private investigators were indeed practicing an obstruction of justice, instead of bringing back what they honestly found, they could easily have added some hair curlers.

The substantiality of Madonna's separate De Robertis existence in Florida was further evidenced by the checking account he had opened in October 1975 as De Robertis in the Barnett Bank of Seminole County in Altamonte Springs, from which checks were issued, *inter alia*, for the apartment rent and the American Express account. T. 1238-47.

## B. Boriello's Use of Madonna's Rented Car.

The uncontradicted testimony of Starace establishes that, after renting the red Ford at 3:40 p.m. on August 19, Madonna parked it at the Jacobi Hospital, about five blocks from his home, and left it there, going off to a restaurant with Starace and then being driven home in the latter's car. T. 1501-03, 1518. Madonna, whose home was under surveillance by a narcotics agent at the time, was later observed taking his family to dinner in another car. T. 665-66.

The red Ford does not reappear upon the scene until the afternoon of August 20, at which time, according to the evidence offered by both sides, it appears to have been in Larca's custody. Since neither Madonna nor Larca testified at the trial, the record does not disclose how Larca got custody of the car—whether, consistently with Madonna's avowed purpose in renting it, he gave the

keys to his friend Larca for Joy to pick up on her arrival, or whether, as the government contended, Madonna gave Larca the keys for Boriello's use in delivering the heroin.

Boriello testified that he saw Madonna at Larca's house for a minute at about 3:00 p.m. and then, about 3:30 or 4:00 he left with Larca and they drove to a location on Bronx Park East where the red Ford was parked, and Boriello then drove off in it to Travers' apartment. T. 219-21. His testimony was that he went to Larca's house three times on August 20. On the first occasion he parked his car some distance away and walked to the house where Larca met him at the gate and they walked to where Boriello had parked and then back to the gate, at which point they saw Agent White watching them.[7] T. 217. Boriello said he then visited his brother and, later, went again to Larca's house, where he sat and drank coffee. He then left to go to a public telephone, after which he went again to Larca's house. It was while he was there on this third occasion,

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[7] It was Larca, according to Boriello, who first noticed Agent White and suspected that Boriello had been followed. T. 302-03. Agent White, testifying about the incident, said he had indeed followed Boriello to Larca's house and had seen him actually enter and then come out with Larca to walk toward the parked car. T. 841-47. Agent White further testified that, on the basis of his nine years of experience, he could conclude that Larca and Boriello had indeed recognized him as an officer of the law. T. 829.

If Madonna was involved in the crime with Larca and if, as the government contends, Larca left shortly thereafter to pick up Madonna, preparatory to entrusting the red Ford to Boriello for the heroin delivery, he would surely at least have mentioned to Madonna his suspicions about Boriello having been followed to his house. Yet, as the government concedes, Larca kept the information to himself. T. 58.

according to Boriello, that, at about 3:00 p.m., Larca came in with Madonna who stayed only a minute. T. 218-19.

Boriello's half-brother, Ralph Battista, on the other hand, testified that Boriello arrived at Larca's house shortly before 2:00 p.m.; that he asked Ralph to borrow a car for him, because he needed to pick someone up at the airport, as his own car was not running well enough to risk driving in traffic; that Ralph asked Larca for the loan of a car for Boriello; that Larca agreed to lend him "the rented car"; that, after a few minutes, Boriello said he had to leave and asked for the keys to the car; that Larca gave Boriello the keys, took him to the gate and directed him to the car; that Boriello left, without Larca, at about 2:20 p.m.; and that Madonna did not arrive until about forty-five minutes later. T. 1361-72. Ralph's testimony was in all significant respects corroborated by Larca's brother, Ben. According to Ben Larca, moreover, Larca did not leave the house until about 3:45 or 4:00 p.m. T. 1254-56, 1294, 1305-07.

The record shows that all of the actors in this drama seem to have been under rather close surveillance by narcotics agents. Surveillance reports on both Madonna and Larca, for example, were shown to the government's informer, Visceglie, as early as February 1976. T. 1175. Madonna, moreover, was under surveillance as late as August 19, the day before the crucial events. A. 61-65. And when he was safely ensconced with his family for dinner that night, the surveillance was terminated only "for the night." A. 65. Boriello, as we have seen, was tailed from his home to Larca's on August 20. At about 2:30 p.m. that day, moreover, a narcotics agent was writing down the license numbers of all cars parked in the vicinity of Larca's house. T. 1000-01. It would seem,

therefore, that the government should have been in a position to corroborate Boriello's story that the red Ford was on Bronx Park East and that Larca took him there to deliver it to him after Madonna's appearance at Larca's house.[8] But the government produced no witness other than Boriello who could testify:

1. That Boriello left Larca's house at 3:30 or 4:00 to pick up the red Ford, rather than at about 2:20.

2. That he left with Larca, rather than alone.

3. That Madonna had arrived at Larca's home before Boriello left, rather than forty-five minutes later.

4. That Madonna arrived with Larca, rather than alone.

5. That Madonna entered the house, rather than merely speaking to Larca for a minute at the gate.

6. That Boriello picked up the red Ford at Bronx Park East, rather than at the Jacobi Hospital where Madonna had parked it the night before.

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[8] The government seemed more interested in the gratuitous prejudice it could create with the *fact* of surveillance than in any truth it could reveal with the *results* of the surveillance. The avowed purpose of Agent Toal's testimony was to establish that Madonna had the use of a rental car other than the red Ford the evening of August 19, a fact easily provable through the records of the rental company once the agent had seen the car. The real purpose of putting the agent on the stand was to sneak in the fact that Madonna was under surveillance by narcotics agents even apart from this case. Defense attempts to exclude the fact of the August 19 surveillance were totally frustrated by the district court's implacable rules against both "speaking objections" and sidebar conferences (A. 62-65, T. 706-07), rules which the court recognized put the defense "in a box." T. 706-07.

All it produced in purported corroboration of Boriello's story was the testimony of two of the surveilling agents that they saw Larca drive off, after 2:30 p.m., in a gray Corvette in the direction of Bronx Park. T. 784-85, 1001-02. This piece of testimony, which seems to prove nothing at all, was used by the prosecutor in summation to fill in all the holes in this case. He was permitted to tell the jury (A. 167-68) that:

> 1. Larca drove to the location at Bronx Park East where Boriello claimed to have picked up the red Ford.
>
> 2. There he met Madonna who had just moved the car there from the Jacobi Hospital where he had parked it the night before.
>
> 3. Larca then brought Madonna back to Larca's house where Boriello met him.

When defense counsel objected to the prosecutor's remarks as improper summation because there was "not one single iota of proof of that," the district judge, departing for this one and only time from his practice of not commenting on the evidence and allowing the jury's recollection to control, stated:

> "All right. The jury will recall the testimony, and *it appears to me, from the things that have been brought up, that this is a fair comment on the evidence. That is all I can say.*" A. 168 (emphasis added).

As we have shown there was *no evidence* to support the prosecutor's assertions. The judge's remark was, therefore, grossly erroneous and, singled out as it was as his sole expression of opinion on the evidence, could not fail to have been prejudicial.

## C. Madonna's Purpose in Accompanying Larca to 58th Street and Fifth Avenue.

Boriello's mother, Mrs. Vera Battista, testified as follows concerning her visit to her son in jail shortly after his arrest:

> "I asked him what happened. He told me he had been arrested on 58 Street and Fifth Avenue, and in the meantime he had borrowed a car from somebody and called them to meet him to pick up the car. When they got down picking up the car he said about 20 agents surrounded him and arrested them. He yelled out, 'I'm guilty, leave them alone, they had nothing to do with it.'
>
> "Then he went on to tell me the story as to why he was arrested and that they had transported heroin and Leslie's friends had turned them in. They had imported the heroin. He was supposed to meet them to pick them up.
>
> "The reason he called up these boys is that the federal agents had told him that if he didn't start implicating other people, a certain Mr. Larca who they were looking for, that they would go home and arrest Leslie,[9] and he said, 'I couldn't have them arrest Leslie, so I had to implicate them. I thought I could straighten it out after, but I never could' " T. 1463-64.

Whether Larca was, indeed, thus dragged into Boriello's crime because he lent Boriello Madonna's rented car without knowing what it was to be used for must

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[9] Leslie was the woman with whom Boriello had been living for a number of years and whom he referred to as his wife. T. 307, 369.

depend upon the credibility of Boriello's trial testimony. Madonna, however, as we have shown, was in no way implicated by Boriello and his involvement, as the district court found, rests only upon the circumstances that it was his rented car that Boriello was using and that he accompanied Larca to 58th and Fifth to retrieve it.

If, as concluded by the district court, those circumstances were enough to sustain a conviction by the jury, the burden upon the defense was to supply an innocent explanation of the circumstances. That explanation, sought to be introduced through the testimony of Larca's brother, Ben, and Boriello's half brother, Ralph Battista, was that Madonna had no prior knowledge of the loan of his car to Boriello, that he was angry at Larca when he learned of it, and that he accompanied Larca to 58th Street and Fifth Avenue to get the car back.

Ben Larca testified that he was at his brother's home on August 20 and that, about forty-five minutes after Boriello's departure with the keys to the borrowed car, he heard Madonna at the gate "yelling" to Larca and "carrying on". A. 84-85. The prosecutor objected to any testimony as to what Madonna said to Larca (A. 85) and, after a proffer in the absence of the jury (A. 101-111), the objection was sustained. A. 111. The proffered testimony which the jury was not permitted to hear was that Madonna yelled at Larca:

> "How could you lend somebody I don't even know my car?"

Similar testimony was offered through Boriello's brother, Ralph, but again was excluded. A. 112-13. Ralph was prevented from testifying even to the conversants' gestures and expressions. A. 113-17.

We submit that the testimony of Ben Larca and Ralph Battista as to the statement they heard Madonna utter to Salvatore Larca was admissible and that, from the statement, the jury could properly have inferred that Madonna's purpose in accompanying Larca to what Boriello said was a heroin delivery was the wholly innocent purpose to retrieve his rented car.

The problem the defense had of establishing Madonna's purpose in going with Larca to what turned out to be a heroin delivery could have been solved more easily and more directly, of course, by Madonna's own testimony, had he been permitted to take the stand on his own behalf without exposure to improper and highly prejudicial impeachment. Toward that end, his counsel, on November 1, 1976, filed a "Notice Of Motion To Deny Admission Of Prior Criminal Conviction Of Defendant To Impeach His Testimony." A. 281-83. The motion, seeking to preclude Madonna's impeachment by his twenty-two-year-old homicide conviction, was denied by the district court. A. 284. That denial, which we shall hereinafter show to have been plainly erroneous, effectively prevented Madonna from testifying in his own behalf and telling his "side of the story". That ruling, moreover, enhanced the prejudicial effect of the exclusion of the Ben Larca and Ralph Battista testimony which could have filled the gap left by Madonna's own silence.

## D. Other Areas of Prejudice.

### 1. The Prior Similar Act Evidence.

The government by a bill of particulars gave notice that it would offer the testimony of one Visceglie to a February 1972 negotiation he had had with Madonna and Larca for the purchase of heroin. A. 11a-11d. The

admissibility of that testimony was attacked by a motion to suppress. A. 52-60. Over defense objections, the district court held it admissible (A. 76-77), instructing the jury, however, that they were not to consider it as evidence that Madonna or Larca did any of the acts charged in the indictment, but only as bearing on the knowledge and intent with which they did such of the acts as the jury should find them, from other evidence, to have done. A. 78-79. Visceglie's testimony was that, in a series of meetings he had with Madonna and Larca and with Larca alone over a two-day period in February of 1972, four and a half years before the events of this case, a deal was made for them to sell him ten kilos of heroin, but that the deal fell through when he failed to raise the necessary money. T. 1078-92.

Since none of the alleged meetings Visceglie referred to was attended by any third party, his testimony could be neither corroborated nor rebutted. There were, however, circumstances pointing very strongly to the unreliability of the uncorroborated testimony. Visceglie was an oft-convicted violator of both federal and state laws and, at the time he testified, was serving a number of sentences, including one of three years to life, and was awaiting sentencing on another crime. At the time of his testimony he was an inmate of the Metropolitan Correctional Center, sharing a cell with Boriello in the "protective custody" section of the institution, where informers were housed. T. 1094-96. His cooperation with the government in this case was to be brought before the various authorities controlling the duration of his imprisonment. T. 1075-76, 1133. He had already received money from the government (T. 1144) and expected to be turned loose from prison and to be "relocated" by the government. T. 1146-47. When he pleaded guilty on November 19, 1975 (T. 1134) in the Supreme Court of

Bronx County, to a two-year-old crime (T. 1130), he was unable, under questioning by the court, to remember the facts and circumstances of his crime. T. 1134-35. The details of his purported four-and-a-half-year-old uncompleted criminal venture with Madonna and Larca, however, were supplied in this case with incredibly precise specification of times and places. T. 1078-92.

Further indications of the unconvincing nature of his story of a narcotics negotiation with Madonna in February 1972 were Visceglie's admissions, under cross-examination, that, both shortly before that time and a year afterward, Madonna had denied any interest in the narcotics traffic. Visceglie testified that he borrowed $10,000 from Madonna in December 1971 and tried to speak to Madonna about a narcotics deal as a source of repayment, but Madonna refused to discuss it. T. 1113-15. He testified further that in an encounter in a car-wash in 1973, Madonna had told him, "referring to the narcotics trade, that he wasn't in that business." T. 1116. The prosecutor, troubled by the obvious weakening of the story of Madonna's narcotics involvement in February 1972 when bracketed on both sides by his non-involvement, played a shabby trick. In summation to the jury, he simply misquoted the testimony as to the 1973 conversation. He portrayed Madonna as saying:

> "I'm not in that business *any more*." A. 155 (emphasis added).

When defense counsel objected to the highly prejudicial addition of the words "any more" and pointed out, moreover, that the prosecutor's misstatement could hardly have been inadvertent since the testimony in question had been adduced directly out of the transcript of Visceglie's grand jury testimony, the district court's only comment was, "All right." A. 156. By not intervening at

that point to correct the prosecutor's clear misstatement of the record, the court, having first allowed the jury to hear Visceglie's highly doubtful testimony, actually strengthened its prejudicial effect.

### 2. The Portman-Klinger Conversation.

The narcotics agents flew Miss Portman back from Honolulu and installed her in the Sheraton Hotel in New York in their custody. T. 478-79. From there, in the presence of four agents, they caused her to telephone defendant Klinger at 10:04 p.m. on August 20 and the conversation was taped and a transcript was made of it. A. 45-50, Gov. Exhs. 52 and 52A, A. 285-94. In that conversation, in addition to some statements tending to inculpate himself, Klinger, under questioning by Miss Portman about whether "the people he [Boriello] works with are really, you know, up there," used such expressions as "heavy duties", "heavies", and "the Godfather". To her query whether they were "mafiosa", he replied that they were people he "wouldn't want to know too personally." He also referred to the possibility of Boriello getting "shot". A. 290, 294.

With the evidence it had against Klinger through the testimony of Boriello and Portman, the government must have known its case against him was ironclad without introducing this telephone conversation. Even if it was felt necessary to inculpate him through his own words, the earlier portion of the objectionable conversation, without the inflammatory language, would have sufficed. Moreover, the government knew from Boriello that Klinger had been told absolutely nothing about any associates of Boriello and, therefore, that his inflammatory characterizations in the phone conversation were not meant to apply to Larca and Madonna or, indeed, any-

one else. Nevertheless, overruling defense requests under Rule 403, Fed. R. Evid., to exclude or even to redact the conversation, the court actually let it go to the jury three times: through the testimony of Miss Portman, through the playing of the tape and through their reading of the transcript. A. 24-51. The only concession to the defense objections was an instruction to the jury to consider the conversation only against Klinger and not against Larca or Madonna. A. 45-46.

### 3. The Contrived "Italian" Testimony.

Not content with the automatic and inevitably prejudicial effect of these inflammatory words upon Madonna, the government sought to create further prejudice by taking advantage of the unfortunate mythology about Italians being criminals. The agent who surveilled Madonna's home on August 19, made a report that he had seen him driven home that evening by an unidentified man (A. 64) who turned out to be Mr. Starace. But twenty minutes before the agent took the stand, the prosecutor, in preparing him to testify, made sure of the prejudice he desired. Under cross-examination the agent testified as follows, (A. 68-70):

> "Q. So in your report you didn't refer to this man as an unidentified Italian, did you?
>
> "A. I don't believe I did. Just unidentified.
>
> "Q. And is the reason for your conclusion of the ethnic term 'Italian' for the purpose of this trial before the jury—and I would ask that Mr. Flannery stop shaking his head—the fact that you were told to do so by the prosecutor?
>
> "A. I was asked if he looked Italian and I—
>
> "Q. By whom?

"A. By the Assistant, Flannery.

"Q. Which Assistant?

"A. Flannery.

"Q. The fellow who was shaking his head when I asked the question?

"A. Yes.

"Q. And when were you asked this?

"A. About twenty minutes ago.

"Q. Twenty minutes ago? And I presume that when he mentioned the word 'Italian' in his question you said 'Yes,' did you not?

"A. Yes, I did.

"Q. And I presume or is it not correct, that when you said 'Yes, he did,' Mr. Flannery said or suggested to you that you use the word 'Italian' for describing the driver of the automobile?

"A. He asked me if the man appeared Italian and he told me he was going to ask me that question.

"Q. And when you said 'Yes,' he said in words or substance, 'I want that in the answer,' didn't he?

"A. Not in those words.

"Q. Not in those words necessarily, but wasn't that the substance of the conversation he had with you twenty minutes ago?

"A. He didn't say that.

"Q. What did he say before your testimony here regarding the description of the driver?

> "A. He asked me about the driver of the car. He asked me, "Did he appear Italian?' And I said, 'Yes, he appeared Italian.' He said, 'I am going to ask you that question on the stand," and I said, 'Okay.'"

Disturbed at having been caught in another shabby trick, the government sought to glide over it in summation by denying that it was "trying nationality" and by saying:

> "Whether or not anyone thinks he [Starace] looks Italian or not may be irrelevant. But the description by that agent was of a person who was Italian. It just happens that way." T. 1976.

We submit that here it did not just happen that way. It was contrived prejudice. While there was nothing the trial court could do to repair the prejudice, there should at least have been a denunciation of the prosecutor's conduct which might have impressed the jury with its impropriety.

### 4. The Einstein Methadone Institute Evidence.

Since Boriello, with the exception of claiming to have met Madonna for a minute at Larca's house before leaving to pick up the red Ford (a claim disputed in the testimony of Ralph Battista and Ben Larca), did not refer to Madonna in his testimony, the reversal of Madonna's conviction does not depend upon impeaching Boriello. That undertaking can, for the most part, be left to the brief of appellant Larca, whom Boriello did implicate in the crime. However, since the mere use by Boriello of Madonna's rented car and Madonna's acceptance of the return of the car would obviously not have justified prosecuting Madonna in the absence of Madonna's intimacy with Larca, we wish to refer briefly

to one clearly improper restriction by the district court on the defendants' right to impeach Boriello.

The conspiracy in this case was alleged to have begun on or about May 1, 1976. A. 8. The government's theory in this regard and Boriello's supporting testimony were that, on or about that date, Boriello returned from a trip to Bangkok (in which Larca was not involved except to the extent that Boriello had made the trip with money borrowed from Larca), carrying with him a sample of heroin; that he showed Larca the sample; that they had it chemically tested; that, because of the high degree of purity of the sample and because of Boriello's assurances that his source could supply large quantities, Larca financed a second trip in June from which Boriello brought back a full kilo; and that the success of that venture led to the undertaking charged in this case. T. 50-53, 109-36.

For the second trip (June) and the third (July) the government was well supplied with Boriello's travel documents. T. 124, 129-33, 137-39, 186; Gov't Exhs. 1-4, 16, 18. For the first trip, however, which Boriello said was from the last week in April to the first week in May (T. 109-12, 242-43), there were no corroborating documents. Indeed, the passport Boriello used on the second trip was not issued until May 12. T. 241, Gov't Exh. 1. For the first trip, said Boriello, he had used a forged passport, since then destroyed, which he had obtained from a friend in Montreal bearing the proverbial name "Smith", whose present whereabouts Boriello did not know. T. 242-44, 255-56.

Suspecting that the story of the first trip was a fabrication, the defense investigated and received information leading them to believe that Boriello had been in New York at the time of the purported trip receiving

treatments for his drug addiction at the Einstein Methadone Treatment Clinic. They subpoenaed the records of the Clinic, but not having received compliance, requested the help of the court. T. 1456-60. Certain records were then received by the court and, found to be admissible, were received in evidence. A. 138, 152-53. Thereafter, defense counsel were summoned to the robing room where they found three representatives of Einstein. The judge informed them that he had been in private communication with Narcotics Agent Meale who had shown him that the records that had been received were not reliable. He then called upon one of the Einstein representatives, Mr. Marion, to explain the nature of the unreliability. Mr. Marion stated that, while the records showed clinic visits by Boriello on certain dates, the entries were made "essentially" for billing purposes rather than for the purpose of recording the accurate date of the visit. A. 157-59. Marion admitted that the dates were not entered by him but rather by "someone in the pharmacy". A. 163. Defense counsel pointed out that the records were admissible as records kept in the regular course of business and that the government should then bear the burden of challenging them. They also pointed out that the records should not be rejected as unreliable on Mr. Marion's interpretation, but that the person who made the entries should be called upon to interpret them. A. 164-65. Notwithstanding all defense pleas the court ruled:

> "I'm not going to delay the trial. This is a matter that is not directly involved in this trial. You have other issues, it seems to me, that go to the credibility of this man. I'm not holding up the trial for that.
>
> "As far as my ruling on the matter is concerned, it is that the records are not reliable. It is on here. If I made an error then, of course, if necessary, you know what to do with it." A. 165-66.

The records were then made a court exhibit and preserved for appeal. A. 166; Court Exh. V, A. 313a-313a.

An investigation conducted by the defense in preparation for a post-verdict motion demonstrated, as detailed in the supporting affidavit of Stephen C. Delaney, a private investigator, that the Einstein records were indeed completely reliable and that they established beyond peradventure that Boriello had visited the Clinic every day during the last week of April and the first week of May. A. 303-306. Further records of the clinic delivered to the court and seen by the defense for the first time at the sentencing proceedings (A. 295-302) corroborated this conclusion. Nevertheless, the post-verdict motion was summarily denied.

## Questions Presented

1. Whether defense witnesses may testify that they overheard the defendant utter a declaration evincing an angry state of mind that tended to negate the government's theory of the case and to support the defense of lack of criminal intent? Was it error for the trial court to exclude such testimony on the ground that it was inadmissible hearsay?

2. Was it error to deny defendant's motion to exclude evidence of a twenty-two year old homicide conviction, entered when he was eighteen years old, for purposes of impeachment, whereby defendant was precluded from testifying?

3. Was it error to receive testimony from an informer, presently incarcerated, as to alleged prior similar acts by the defendant that allegedly took place over four years earlier, given the dubious circumstances sur-

rounding the testimony and in the light of the exclusion of defense evidence of lack of criminal intent?

4. Was it error to admit evidence plainly irrelevant and inevitably inflammatory?

5. Was it error to shelter the chief government witness from impeachment by peremptory reversal of a ruling permitting the defense to introduce business records that would have shown a significant portion of his testimony to be false?

## ARGUMENT

### I. The Exclusion of Testimony as to Madonna's Angry Statement to Larca About the Lending of the Car to Boriello Was Reversible Error.

The issues in this case, with regard to Madonna, were (1) whether his purpose in renting the red Ford on August 19 was to have it used by Boriello for transporting the smuggled heroin, and (2) whether his purpose in accompanying Larca to 58th Street and Fifth Avenue on August 20 was to take delivery of the heroin. The defense sought to prove, as bearing upon both of those issues, that, after Boriello's departure from Larca's home with the keys to the car, Madonna was seen at the gate and was heard angrily shouting at Larca:

> "How could you lend somebody I don't even know my car?"

The government objected to the proffered testimony as hearsay and argued that, as such, it could be received only if Madonna's statement were being offered *against* him as an admission. A. 85-86. The defense contended

that the statement was not being offered for the truth of its contents and, therefore, under the definition of Rule 801(c), Fed. R. Evid., was *not hearsay*. A. 86-87, 91. They further contended that, even treating the statement as hearsay, it was admissible under the existing-state-of-mind exception embodied in Rule 803(3). The district court jumped to a quick conclusion that the statement was hearsay (A. 88), apparently because under Rule 801(d), it was not an *admission* offered *against* Madonna, totally ignoring the Rule 801(c) definition that a statement not offered to prove the truth of the matter asserted is *not* hearsay. A. 94. The defense contention in that regard left the judge somewhat at sea. He said:

> "You may be right, but, as I have said, it is strange to me and is something that I haven't confronted in my own mind." A. 91.

The prosecutor further confused the issue with a novel assertion that statements not offered for their truth may be received only when they constitute admissions by the declarant. A. 91-92.

When the defense then pressed its contention that the statement, even if hearsay, was admissible under Rule 803(2), the district court, apparently more confused than ever, said:

> "Mr. Brown, it is a gray area, and it is an area with which I must confess I am not entirely familiar, but the further the argument goes, the more I am convinced that I am right." A. 99-100.

Finally, after taking a proffer of the evidence in the absence of the jury, the court sustained the government's objection. A. 111.

## A. The Proffered Statement Was Not Hearsay.

Even apart from the avowals of the defense, it must have been crystal clear to the court that Madonna's statement was not being offered to prove the truth of the matter asserted, for *no part of the matter asserted was in issue.* The component propositions in the statement were:

1. Larca lent the car to Boriello.
2. It was Madonna's car.
3. Madonna did not know Boriello.

As to the first two propositions, there was obviously no issue, because the government was maintaining them and Madonna was admitting them. As to the proposition that Madonna did not know Boriello, the government itself had adduced from Boriello the fact that, in a one-minute encounter with Madonna, he had asked Madonna whether they had not met some twenty years before and that Madonna had said they had not.[10]

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[10] To the extent that the jury might have stretched Madonna's description of Boriello as "somebody I don't even know" into a denial by Madonna of Boriello's assertion of the one-minute meeting, that component of the statement would be hearsay. The statement as a whole would nevertheless be admissible, with a proper limiting instructiion, under what Wigmore calls "the principle of multiple admissibility" (6 Wigmore, *Evidence* § 1790 at p. 320 [Chadbourn Revision 1974] and McCormick calls "limited admissibility". McCormick, *Evidence* § 59 (2d ed. 1972). See also: *Carbo* v. *United States*, 314 F.2d 718, 741-42 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); *Sprinkle* v. *Davis*, 111 F.2d 925, 931 (4th Cir. 1940). As Wigmore says, *ibid.*:

> "[The proffered statement] is circumstantial whether or not, in the case in hand, the assertive or testimonial use might be made by the jury; the judge's instructions are the corrective against this. On the principle of multiple admissibility (§ 13 *supra*), if there is any relevant cir-

[Footnote continued on following page]

The only probative effect of the statement, therefore, was for the fact that it was made under the circumstances in which it was made. From the fact that Madonna, between the time of the lending of the car and the time of accompanying Larca to the rendezvous, denounced Larca for lending the car to Boriello, the defense would ask the jury to infer (1) that Madonna had not rented the car for the purpose of lending it to Boriello, and (2) that Madonna was going to the rendezvous, not to receive delivery of heroin, but only to retrieve his car.

As Professor McCormick has written:

> "[I]f the utterance would reasonably be understood as an assertion by the declarant of the existence of his state of mind or feelings which it is offered to prove, it would be hearsay." McCormick, *Evidence*, § 249 at 590 (2d ed. 1972).

Thus, had Madonna said, "I did not rent the car for Boriello" or "I rented the car for Joy" or "I want to go to wherever Boriello is to get my car back" or " I don't know what use Boriello has made of my car", those statements would have been hearsay, for they would be direct assertions of the very state-of-mind issues in the case.

Professor McCormick goes on to say:

> "But, actually, direct declarations of thoughts and feelings are much less frequently offered in evi-

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cumstantial use, the utterance is admissible for that purpose."

In a related context, in *United States* v. *Annunziato*, 293 F.2d 373, 378 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961), Judge Friendly said:

> "True also, the statement of the past event would not be admitted if it stood alone, as the Shepard case holds, but this would not be the only hearsay exception where the pure metal may carry some alloy along with it."

> dence than are declarations which only impliedly, indirectly, or inferentially indicate the existence of the mental or emotional state they are tendered to prove. Declarations offered for this purpose are not hearsay under the suggested definition." [11] *Ibid.*

See also 5 Wigmore, *Evidence* § 1361 (Chadbourn Revision 1974); 6 *id.* §§ 1766 and 1790 and cases there cited; and 4 Weinstein, *Evidence* 801-63 (1976).

The statement here in question, tending only inferentially to negate the state of mind the government had placed in issue in the case, was, therefore, not hearsay.[12]

Wigmore points out that "[t]his discrimination, though well accepted in the law, is easy to be ignored, and it needs to be emphasized." *Ibid.* See also *United States* v. *Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974), in which Judge Friendly, sustaining the admissibility as non-hearsay of a statement by a co-conspirator not offered for the truth of its contents, said:

> "No matter how often appellate courts and commentators seek to explicate the true nature of the rule the notion that any reference to a conversation constitutes hearsay, inadmissible unless within an exception, dies exceedingly hard."

Here, we submit, Wigmore's well-accepted discrimination was "ignored" and "the notion that any reference to a

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[11] The definition referred to (see *op. cit. supra*, p. 584) is not essentially different from the definition of hearsay contained in Rule 801(c), Fed. R. Evid.

[12] To put it another way, as Wigmore does at *op. cit. supra*, § 1790, the statement was not used as testimonial evidence, but only as circumstantial evidence from which inferences could be drawn, a use to which "the hearsay rule makes no opposition."

conversation constitutes hearsay" did not die at all—it thrived.

Judge Weinstein, in his treatise, agrees with the McCormick-Wigmore analysis that a statement offered not as an assertion of the state of mind at issue, but only for the fact that it was uttered, as circumstantial evidence of the declarant's state of mind, is not hearsay. He observes, however, that such a statement, even treated as hearsay, would in any event be admissible under a well-established exception to the hearsay rule. He finds little profit, therefore, in "focusing on the technical question of whether a given statement is beyond the hearsay rule's scope or whether it qualifies as exception . . ." and he suggests, accordingly, that the statement be tested under the provisions of the exception. 4 Weinstein, *Evidence* 801-63 (1976).[13] As we shall next show, the statement here, thus tested, plainly passes muster.

## B. The Proffered Statement, If Hearsay, Was Admissible Under the State-of-Mind Exception to the Hearsay Rule.

In *Nuttall* v. *Reading Co.*, 235 F.2d 546 (3d Cir. 1956), the issue was why the decedent had gone to work—whether under pressure from his employer, or for some other reason. The trial court rejected decedent's wife's

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[13] See also McCormick, *Evidence* 694 (2d ed. 1972):
"In most cases, the declarations are not assertive of the declarant's present state of mind and are therefore not necessarily within the hearsay exclusionary rule. Courts, however, have tended to lump together declarations asserting the declarant's state of mind with those tending to prove the state of mind circumstantially, and have developed a general exception to the hearsay rule for them without regard to the possibility that many could be treated simply as nonhearsay."

testimony that, in a telephone conversation with the employer, he had said he was ill and did not want to go to work and that he was being forced to go. On appeal, it was held that the testimony should have been received. The court said:

> ". . . [T]he fact of a conversation in which the speaker was protesting and at the end of which he looked angry and clenched his fists is circumstantial evidence to prove that which he did thereafter was in submission to the force which he thought had been exerted. All of this is not an exception to the hearsay rule at all . . . .
>
> "In this instance, however, it matters not whether the evidence was hearsay. One of the exceptions to the rule excluding hearsay is that a man's declarations as to his state of mind may be used to establish that state of mind and, to some degree, such other things as proof of a state of mind tends to establish." *Id.* at 551.

Here, as well, "it matters not whether the evidence was hearsay," for, even if the Madonna statement be read as a testimonial assertion of the state of mind at issue in the case (and therefore hearsay), his declaration may, under the exception, "be used to establish that state of mind . . .". Moreover, since here, as in *Nuttall*, only the state of mind itself was in issue,[14] and not the acts

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[14] Madonna's statement was offered here as proof of his state of mind existing at about 3:00 p.m. on August 20, the time of the statement. The principle of continuity (see McCormick, *Evidence* 695-96 [2d ed. 1972]) could then be relied upon for the inference, from his expression of displeasure at Boriello using his car, that he had intended no such use when he rented the car the day before and expected no fruits of that use when he later went to take the car from Boriello.

to which it related,[15] we need not become enmeshed in the *Hillmon-Shepard* [16] controversy over whether state-of-mind evidence is admissible under the exception to prove past acts. See 4 Weinstein, *Evidence* ¶¶ 803(3)(04) and 803(3)(05).

The state-of-mind exception to the hearsay rule, as developed at common law, is embodied in Rule 803(3), Fed. R. Evid., which makes a hearsay statement admissible if it is:

> "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ."

Under this rule, the statement here proffered, even if considered as hearsay, was plainly admissible.

The courts' pre-Rule preoccupation with the question whether the hearsay declaration was made under circumstances giving assurance of the declarant's sincerity in making it (see, *e.g.*, Rule 513 of the *Model Code of Evidence* and Rule 63[12] of the *Uniform Rules of Evidence*) was not preserved in Rule 803(3), "because the Advisory Committee felt that good or bad faith essentially bears on credibility, and is a matter for the jury." 4 Weinstein, *Evidence* 803-105 to 803-106. It was ap-

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[15] That the decedent had gone to work was not questioned in *Nuttall*. Here, similarly, there is no question that Madonna rented the car and that he went to the rendezvous.

[16] *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892), and *Shepard* v. *United States*, 290 U.S. 96 (1933). For this Court's view of that controversy, see *United States* v. *Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).

parently felt that a declarant's statement of his "then existing" state of mind, in reaction to a situation triggering the statement, is sufficient assurance of sincerity. And, of course, the less reactive the statement was to the situation triggering it, the less likely it is to impress the jury. Furthermore, if the circumstances of the declaration seem to make it less probative than prejudicial, Rule 403 is available as a basis to exclude it.

Starting, as one must, with the presumption of Madonna's innocence, the proffered declaration was a perfectly natural reaction to learning that his car had been lent to a stranger. Further, nothing in the circumstances in which the declaration was made detracts from its apparent sincerity. There was no apparent motive falsely to impress anyone, for there was no one present but his friends, whom he had no need to impress. Had his purpose been to impress them, moreover, he would have made sure they could hear his declaration, rather than making it at the gate without any assurance that anyone but Larca would hear it. Nor did Madonna have any reason to believe that any government agents might be lurking nearby to record his declaration with their listening devices because, as the prosecutor himself pointed out, Larca had not informed Madonna about earlier spotting Agent White in the vicinity. Thus, under the considerations embodied in Rule 403, there could have been no reason to exclude the declaration.

We submit, therefore, that the rejection of the proffered statement was error.[17] In view of the crucial

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[17] The government's notion, *supra*, pp. 26-27, that statements like these are admissible only when offered *against* the defendant as admissions, sprang perhaps from the fact that most of the decided cases holding proffered statements admissible either as non-hearsay or as exceptions to the hearsay rule deal, indeed,

[Footnote continued on following page]

importance of the testimony to Madonna's defense,[18] we further submit that the error was plainly prejudicial, requiring reversal of the conviction.

## II. The Denial of Madonna's Motion to Preclude His Prior Conviction Was Prejudicial Error.

With the rejection of the proffered Ben Larca and Ralph Battista testimony as to his statement at the gate,

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with prosecution proffers. It would seem, however, that the confrontation clause of the Sixth Amendment, imposing some philosophical impediments to the offer of extrajudicial declarations *against* the accused, imposes none to such an offer *on his behalf*. In *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), reversing a conviction for denial of the defendant's right to introduce out-of-court confessions of a third party, the Court said:

> "That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."

As one commentator has written:

> "At the very least, therefore, *Chambers* stands for the proposition that evidence that is sufficiently reliable by constitutional standards to be introduced 'against' the accused is sufficiently reliable to be introduced 'in his favor.'" Western, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 155 (1974).

Judge Weinstein, indeed, has suggested that, with developing changes in the rules of criminal procedure, defense proffers may be more generously received than those of the prosecution. In *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 385 (1967), he wrote:

> "Mutuality is not a doctrine usefully applied since the investigative resources of government and defendant are often disparate. Moreover, the confrontation doctrine, insofar as it is applicable, is available to the defendant only."

[18] The proffered testimony takes on greater significance to the extent that it could have served to negate the prosecutor's gross distortion of the evidence—a distortion approved by the court—concerning the movements of the rented car and the circumstances of Madonna's arrival at Larca's house. *Supra* p. 18.

Madonna's only way of adducing evidence of the innocence of the acts upon which the government relied to incriminate him was to testify on his own behalf.[19] He was faced, however, with the prospect that, if he took the stand, the government might impeach him by the record of his conviction of murder in November 1954, a conviction later reduced to manslaughter in a *coram nobis* proceeding. He filed a motion, therefore, on November 1, 1976, the day the trial commenced, to preclude such impeachment. A. 281. On November 9, 1976, the day before the government's case was completed, the district court denied the motion without a hearing. A. 284. Under the compulsion of that denial, Madonna, fearing the prejudicial effect of evidence of his prior conviction, elected not to testify.[20]

Rule 609(a), Fed. R. Evid., makes admissible for impeachment (1) a felony conviction as to which the court determines that "the probative value of admitting [it] outweighs its prejudicial effect to the defendant," or (2) any conviction, whether felony or misdemeanor, if it "involved dishonesty or false statement. . . ."

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[19] Since Madonna's pretrial motion for severance of his trial from Larca's had been denied and Larca chose not to take the stand, Madonna could obviously not look to Larca as a source of evidence of his lack of criminal intent.

[20] The defendant in *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971), on the horns of the same dilemma, elected to testify and, indeed, to soften the blow of the impeachment, himself brought out the prior conviction. This Court, holding that the pre-trial ruling that the conviction could be used for impeachment was an abuse of discretion, held further that Puco was entitled, in the face of that ruling, to try to soften the blow and that he did not, by making that election, estop himself from arguing on appeal the reversible error of the ruling that placed him in the dilemma. Madonna's impalement on the other horn of the same dilemma obviously gives him no lesser standing on appeal.

Rule 609(b) then goes on to place a time limit on any prior conviction to be used for impeachment. It makes it inadmissible if more than ten years have passed since the conviction or the release of the witness from the resultant confinement, whichever is later, "unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

The prior conviction here in question was *twenty-two* years old, well past the limit laid down by Rule 609(b). We concede, however, although the record does not reveal the fact, that Madonna had not been released from confinement until *eight years* before his trial, within the limit of the rule. We cannot and do not, therefore, rely upon the time factor as a dispositive argument under Rule 609(b).

Our contention here is that it was reversible error to have denied Madonna's motion to preclude the use of the conviction for impeachment for a combination of the following reasons:

1. A homicide conviction, since it does not involve "dishonesty or false statement," is inadmissible under Rule 609(a)(2).

2. Such a conviction is not admissible under Rule 609(a)(1), "unless the court determines that the probative value of admitting [it] outweighs its prejudicial effect to the defendant. . . ." Here there was no such judicial determination. Indeed, had the court below so determined, it would have been an abuse of discretion,

because the prejudicial effect is obviously immense [21] and the probative value just as obviously miniscule. As this Court said in *United States* v. *Puco*, 453 F.2d 539, 543 (1971):

> "Violent or assaultive crimes . . . generally are not thought to reflect directly on veracity." [22]

See also the statement of Chief Justice, then Judge, Burger in *Gordon* v. *United States*, *infra* note 22:

> "Acts of violence . . . which may result from a short temper, a combative nature, extreme provo-

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[21] See the colloquy between Judge Friendly and Representative Dennis in the course of Judge Friendly's testimony in the Hearings before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93rd Cong., 1st Sess., on Proposed Rules of Evidence, Serial No. 2, pp. 251-52 (1973), quoted at 3 Weinstein, *Evidence* 609-10 (1976):

> "Judge Friendly: . . . [D]o you really think if you were on a jury, you would not like to know if the witness had committed a murder. I think I would like to know.
>
> "Mr. Dennis: I think I would like to know it, but I think it is very unfair to ask a man who is on trial for some irrelevant or unrelated offense, whether he committed murder or manslaughter 5 years ago. All it does is prejudice the case. It has nothing to do with his credibility in my judgment, especially murder. That is the primary example. Those are usually one time offenses.
>
> "Judge Friendly: Perhaps in taking murder I chose an unfortunate case. But, of course, there is the overriding rule that the judge can always exclude testimony where probative value he thinks is outweighed by its prejudicial effect and perhaps in the case we are discussing he should do that."

[22] The Court cited, in this connection, *Jones* v. *United States*, 402 F.2d 639, 643 (D.C. Cir. 1968); *Gordon* v. *United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); *Brown* v. *United States*, 370 F.2d 242, 243 (D.C. Cir. 1966); and *United States* v. *Palumbo*, 401 F.2d 270, 274 (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969).

> cation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not. . . ."

Moreover, the probative value-prejudice equation could not have been resolved here in favor of admissibility because the burden of convincing the court in this respect is upon the prosecutor, *United States* v. *Smith*, 20 Crim. Law Reporter 2320 (D.C. Cir., Dec. 17, 1976); 3 Weinstein, *Evidence* 609-67 (1976), and he failed even to respond to Madonna's motion.

3. The staleness of the twenty-two-year-old conviction, for a crime committed when defendant was eighteen years old, while not a dispositive bar to admissibility under Rule 609(b) in view of Madonna's only eight, rather than ten, years of freedom, is, however, a cogent factor against admissibility under Rule 609(a), or, alternatively, under Rule 403, the catch-all provision for exclusion of relevant evidence whose "probative value is substantially outweighed by the danger of unfair prejudice. . . ." In *United States* v. *Puco*, *supra*, 453 F.2d at 543, this Court held:

> "The probative force of Puco's 21-year old narcotics conviction also is greatly diminished by its age. . . . That some convictions may be too venerable to bear reasonably on the present credibility of a defendant has often been recognized. . . . While we think it better not to establish rigid age limitations on the use of prior convictions for impeachment purposes, we do hold that Puco's 21-year old conviction had little bearing on testimonial trustworthiness."

The even greater age of Madonna's prior conviction, in the absence of a showing made below by the government that its probative value outweighs its prejudice, is, we submit, an *a fortiori* case for exclusion.

## III. The Admission of the Visceglie Testimony of the Alleged Prior Similar Conduct Was Reversible Error.

This Court's rule is that prior similar offense evidence is admissible if "it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). See also *United States* v. *Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); and *United States* v. *Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Cf. Rule 404(b), Fed. R. Evid.

The Visceglie testimony about his aborted 1972 transaction with Madonna and Larca, as the government stated in response to Madonna's suppression motion, was designed, *inter alia*, to show "Madonna's and Larca's relationship", that is to say, their roles in an alleged ongoing narcotics business. The district court, however, refused to admit the testimony for that purpose (T. 1232), receiving it only on the issue of "intent". A. 76-79. The evidence was received in the government's case in chief because Madonna's counsel, in his opening statement, had predicted that the evidence would show that Madonna's intent in renting the car and going to the rendezvous was innocent. A. 76-77. But the Ben Larca and Ralph Battista testimony that would have shown the innocent intent was rejected and Madonna's own testi-

mony was precluded. In the vacuum thus left on the "intent" issue, the instruction to the jury to consider the Visceglie testimony on that issue alone must have been singularly ineffectual and the risk that they would consider it on the general issue of guilt or innocence must have been far greater than is usually the case. As was said in a similar situation in *United States* v. *DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970):

> ". . . [T]he prejudice engendered by the admission into evidence of the prior acts of misconduct . . . far outweighed its legitimate probative worth, and . . . therefore it was an abuse of discretion for the trial court to allow its admission though the admission of the testimony was accompanied by cautionary instructions to the jury."

The jury having heard not a word in substantiation of Madonna's innocent intent defense, it cannot realistically be denied that the government had its way in this case. It used Visceglie to establish an ongoing narcotics business in which Madonna and Larca were partners, going back at least to February 1972. This is not a case like *United States* v. *Araujo*, 539 F.2d 287, 289 (2d Cir. 1976), where the prior conduct was properly received because it "tended to show the existence of a broad counterfeiting conspiracy, of which the conspiracy charged in the instant indictment was a part." Nor is it, like *Natale*, *supra*, a case where the prior conduct showed a continuing creditor-debtor relationship between the defendant and the victim; nor, like *United States* v. *Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), was it a case where the prior conduct "was admitted to explain how [one of the conspirators], who had been incarcerated from 1966 through August, 1973, was able to become an accepted member of the conspiracy upon his release." In this case, the plain and simple message of the Vis-

ceglie testimony to the jury was that Madonna and Larca were narcotics dealers. That is the very message this Court forbids such testimony to convey.

Even if the Visceglie testimony were properly directed at some "intent" issue, its admissibility would depend on its probative value exceeding its prejudicial effect. That follows not only from this Court's many decisions, but also from the command of Rule 403, Fed. R. Evid. The determination below that the probative value of the testimony was high enough to overcome the great and obvious prejudice flowing from it was an abuse of discretion, for the following reasons:

1. Significant indices of probative value of a prior offense are how similar it is to the crime charged and how close it is in time. Thus, in *United States* v. *Chestnut*, 533 F.2d 40, 50 (2d Cir. 1976), an illegal campaign contribution case, this Court, sustaining the admissibility of other illegal contributions by the same contributor, in the same campaign, made through the same defendant, stated:

> "The 'similar acts' occurred in close temporal proximity and were closely related in both subject matter and manner to the crime charged in the indictment."

Here the transaction to which Visceglie testified allegedly occurred four and a half years before the events charged in the indictment. The transaction, moreover, was an aborted narcotics sale and not a completed narcotics importation. And Visceglie was in no way involved in the transactions covered by the indictment.

2. Another factor highly significant in assessing the probative value of proffered testimony is the reliability of the witness. It is one thing, of course, to prove

prior similar offenses through documents or through the testimony of law enforcement officers, but quite another thing when the testimony comes from a witness tainted by venality and quite apparently "too good to be true." The Court in *DeCicco, supra,* 435 F.2d at 483 n. 6, while rejecting the prior offense testimony on other grounds, cannot have been unaffected by its observation that "the defense painted a convincing portrait of [the witness as] a man who would do or say just about anything if he could see a profit in it." A similar portrait, we submit, was drawn here at Visceglie. *Supra* pp. 17-18. Not to be ignored, moreover, are the astounding feats of memory performed by Visceglie in testifying at the trial to the specific times and places of inchoate discussions occuring four years and nine months before, especially in comparison with his total failure during a 1975 allocution, in which his interest in acceptance of his guilty plea dictated maximum candor, to recall the circumstances of his own completed crime committed only two years earlier. *Supra* pp. 17-18.

The Visceglie testimony, we submit, should have been rejected under Rule 403, Fed. R. Evid. Moreover, the prejudice that naturally flowed simply from its admission was greatly enhanced when the court neglected to correct the prosecutor's egregious distortion of it, as a result of which the jury was allowed to infer that Madonna had admitted being in the drug business from at least as early as February 1972 to at least as late as sometime in 1973. *Supra* pp. 18-19.

## IV. Additional Points of Error.

### A. The Failure to Exclude the Inflammatory Portions of the Portman-Klinger Conversation Was Reversible Error.

We have shown, *supra* pp. 19-20, that the court below rode rough-shod over eminently justified defense requests that it delete from the Portman-Klinger conversation those inflammatory words which (1) were clearly unnecessary to the government's case against Klinger, (2) were clearly inapplicable to either of the other two defendants, and (3) grossly prejudiced those two defendants. So patent was the prejudice [23] of the inflammatory language that the government should not be heard to deny that the accomplishment of that prejudice was its true purpose in offering the evidence.

The court's instruction to the jury, to which the government readily acceded, to consider the evidence only against Klinger, against whom it was unnecessary, but not against Larca or Madonna, against whom it was lethal, did nothing to serve justice. That instruction, we submit, qualifies as one of the "weaker sounds" which, as Justice Cardozo said in *Shepard* v. *United States*, 290 U.S. 96, 103 (1933), are drowned out by "the reverberating clang of those accusatory words."

### B. The Failure to Admonish the Prosecutor For His Contrived Introduction of the Word "Italian" Was Prejudicial Error.

The Court need not long pause over the question whether the contrived introduction of the word "Italian"

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[23] The words "godfather" and "mafiosa" were especially prejudicial to Madonna in view of the government's depiction of him as the *éminence grise* for whom Larca acted as a mere lackey.

into the testimony of Agent Toal was prejudicial to Madonna. If it were not prejudicial, the prosecutor would not have stooped to contrive it. The plain duty of the district court was to denounce what the prosecutor had done. By adopting an attitude of neutrality, the court allowed the jury to assume that what the prosecutor had done was proper and, more dangerously, then to infer from the characterization a significance that it does not have. Cf *N.Y. Central R.R. Co.* v. *Johnson*, 279 U.S. 310, 318 (1929).

Whether or not this episode standing alone would justify reversal, we submit that it deserves this Court's attention if only as a factor aggravating the prejudice flowing from the "godfather" and "mafiosa" references in the Portman-Klinger conversation.

### C. The Exclusion of the Einstein Clinic Records.

The gross error of the district court's stubborn exclusion of the Einstein Clinic records need not here be expanded upon. We think the mere recital of the court's rulings in the statement of facts, *supra* p. 24, speaks for itself. We trust that such argument as may be required will sufficiently be made in the brief of appellant Larca herein.

### D. All Other Errors.

Appellant Madonna hereby adopts the arguments advanced in the brief filed herein by appellant Larca in respect of such other erroneous rulings of the district court as are applicable to Madonna.[24]

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[24] It was a "standing rule" at the trial that points raised by any defendant would apply to all others as well. T. 98.

## CONCLUSION

**In the light of the foregoing, the conviction of appellant Madonna should be reversed and the case remanded for a new trial.**

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